IN THE

Supreme Court of the United States

October Term, 1964

No. 360

A. M. HARMAN, JR. ET AL, APPELLANTS,

V.

LARS FORSSENIUS, ET AL, APPELLEES

Appeal from the United States District Court
For the Eastern District of Virginia

BRIEF FOR APPELLEES

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PRELIMINARY

Italics are ours unless otherwise indicated. All exhibits of both sides were admitted without objection prior to the trial.

STATEMENTS OF JURISDICTION AND STATUES INVOLVED

The statements of jurisdiction and statutes involved set out in Appelants' brief p. 1 and p. 2 are acceptable to Appellees.

QUESTIONS PRESENTED

Questions 1, 3, and 4, as set forth on p. 2 and p. 3 of Appellants' brief are acceptable to Appellees.

It is submitted that question 2, page 2, ought to be phrased as follows, with changes by this writer being bracketed or italicized:

> "2. Did the court below err in issuing on the authority of Article 1, §2 [and] the Seventeenth Amendment *or Fourteenth Amendment (with its consequent legislation, 42 U.S.C. 1983, etc.)* of the Constitution of the United States a general injunction against requiring compliance by an elector with the Statutes Involved in elections for President and Vice-President of the United States?"

STATEMENT OF THE CASE

The statement that the poll tax is used for educational purposes (Appellants' brief p. 3) is not quite accurate; see *Va. Const.* Article XIII, §173, 2/3 for schools, 1/3 for other uses. And while the accuracy of the statement is not really an issue in this case, the implication is, for the whole tenor of Appellants' brief seems rather subtly designed to divert the attention of the Court away from the real issues of the case.

The brief would seem to say that the poll tax is an innocuous and justifiable measure designed and used wholly to keep track of voters and to provide a presumption of residence, with its proceeds used wholly for educational purposes.

We submit nothing could be further from the fact, and less supported by the record.

The entire authority for these claimed virtues of the poll tax is found by Appellants in the Governor's address to the General Assembly which enacted the contested statutes (R. 73 et seq.), and in the similar statement of the Attorney General (R. 83 et seq.). While the Governor contends the purpose of the poll tax is a mere means of keeping an up to date voting list and providing a presumption that anyone who pays the tax is a resident, the *Debates of the Constitutional Convention of 1902*, support him on neither count.

A careful reading of all the debates on suffrage, p. 2937-3080, fails to reveal a single reference to the poll tax being used as proof of residence or means of keeping an up to date voting list. Poll tax and residence were throughout considered as separate qualifications, as they now are. See *Va. Const.* Article II, Section 18, (R. 84), and *Va. Code* Section 24-17 (R. 94).

The purpose of the suffrage provisions of the Virginia Constitution of 1902 was hardly for such innocent purposes as now claimed by Appellants, rather its purpose was expressed in the *Debates* by the Honorable Carter Glass:

> "Discrimination! Why that is exactly what we propose; that, exactly, was what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution . . ." II *Debates* p. 3076.

It was to eliminate a part of this discrimination that Amendment XXIV to the United States Constitution was enacted.

But the Special 1963 Session of the Virginia Legislature observed neither the permissible action admonition of Senator Glass, nor federal constitutional and statutory limitations. The fact that it did not creates the questions and issues in these cases.

SUMMARY OF ARGUMENT

We will follow the general outline of argument used by Appellants', taking, of course, the opposite position.

Due to the narrowness of the issues and numerous authorities cited by Appellants, we will not attempt to answer each particular case, treatise, etc. but will set forth our position and authority upon which we rely. To do otherwise would result in a volume, the substance of which could not possibly be covered in the time alloted. For example: We are not going to argue in our brief the Virginia cases cited on p. 13 of Appellant's brief, although the three cases clearly indicate that the Legislature in its zeal violated the Virginia Constitution as well as the U. S. Constitution.

We can not let pass unnoticed a statement made at p. 7 of Appellants' brief which is:

> "They argued at length that the Special Acts were unclear . . . ."

Not only is this not the fact, our position was clearly stated at p. 11 in our reply brief in the District Court.

> "The wording and effect of the statutes complained of in this suit are clear and unambiguous."

Appellants apparently overlooked the foregoing and other similar statements in our brief in their rush to the shelter of abstention.

I. We will argue that the certificate of residence is a qualification for voting; that similar requirements have been so held by this court; that neither the poll tax nor the certificate is mere evidence or proof of residence; and will invite particular attention to the wording, effect and history of the Special Acts.

Although more properly placed in the section of the brief on abstention, we will argue that Virginia has not used the time she had to effect any constitutional change required.

II. We will argue that the second question presented to this court by Appellants (p. 2 of their brief) is not correctly phrased; is a strained construction of the opinion and order of the District Court; and that the District Court pointed out in detail the inequalities and discrimination of the Special Acts thus placing them squarely within the prohibition of Amendment XIV to the U. S. Constitution, and Secs. 42 U.S.C. 1983 and 1988.

III. We will argue that the District Court properly denied Appellants' motion for abstention. In the words of the District Court,

> "Whether a requirement of State law constitutes a discrimination against the Federal voter . . . is immediately a Federal question." (R. 46)

The position of the District Court is supported by very recent cases from this court.

IV. We will argue that all indispensable parties were before the court. The District Court said that:

> "Without the acts of these officers no election could proceed" and "they are sufficient parties for the aims of this suit." (R. 48)

The holding of the District Court is supported by the Virginia statute setting forth the relation of the State Board of Elections to the local authorities, as well as by plaintiffs' various exhibits.

We will further argue that the District Court acted properly when it did not dismiss Henderson as a party to the suit because he, particularly, as Chairman of his party, as well as every other federal voter in Virginia, has a real and present interest in the result of a national election.

ARGUMENT

I.

THAT THE CERTIFICATE OF RESIDENCE IS A QUALIFICATION FOR VOTING.

A. Has Virginia had time?

While the Special Acts complained of were brought about by the Twenty-fourth Amendment, the plea that Virginia has had insufficient time does not ring true. There have been two legislative sessions since the 1963 Special Session, one in January 1964, one in November 1964, and neither the 1963 Special Session, nor either later one, proposed any constitutional change concerning poll tax. The situation could have been remedied had the State seen fit, but she did not.

B. Effect and Validity of the Certificate of Residence.

Conceeding, at this time, that the poll tax is a valid qualification for voters in state elections, we pass to the

first full paragraph on page 10 of Appellants' brief. With no significant deletion we find:

> "A fair reading of Acts . . . Extra Session, 1963, compels the conclusion that their purpose and effect were simply to codify . . . and provide the mechanics for administering one set of qualifications . . . for registration and voting in federal elections and another set for registering and voting in state and local elections."

Yet this is exactly the kind of law expressly forbidden by Article 1, Section 2, and Amendment XVII of the United States Constitution. It is expressly forbidden to have one set of qualifications for state elections for the House of Delegates, and one set for congressional elections, with prohibition that poll tax payment may not be required in a national election. Amendment XIV further prohibits discrimination, as do applicable federal statutes.

Virginia seems determined to disregard the express provisions of the U. S. Constitution, and the effect of it, as expressed in the instrument itself, by this court, and in the *Federalist*.

The *Federalist* No. LII (Hamilton or Madison) of February 7, 1788, is more illuminating when more of the commentary is read:

> ". . . I shall begin with the House of Representatives.
>
> "The first view to be taken of this part of the government relates to the qualifications of the electors and the elected.
>
> "Those of the former are to be *the same* with those of the electors of the most numerous branch of the state legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been

improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone . . . It must be satisfactory to every State because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States, because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the Federal Constitution."

The question of qualification has been commented upon by this court on two occasions which are worthy of note here.

In *ex parte Yarbrough* 110 U.S. 51, 28 L.Ed. 274, (1884) it was said:

"The states in prescribing the qualifications for voters for the most numerous branch of our Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nominie*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says *the same persons* shall vote for members of Congress in that State. It adopts the qualification then furnished as the qualifications of its own electors for members of Congress.

"It is not true, therefore, that electors for members of congress owe their right to vote to the state law in any sense which makes the exercise of that right to depend exclusively on the law of the State." 28 L.Ed. 274, 278.

The case of *Pope v. Williams*, 193 U.S. 621, 48 L.Ed. 817, (1904) will be discussed later, but the following quotation is applicable at this point.

"The statute, so far as it concerns him and the right which he urges, is one making regulations and conditions

for the registry of persons for the purpose of voting." 48 L.Ed. 817, 822.

". . . .the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, *provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.*" 48 L.Ed. 817, 822.

". . . .it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law." 48 L.Ed. 817, 822.

Having briefly reviewed a few applicable precedents which should have guided the Legislature, we will discuss the two cases obviously relied upon by Appellants to the exclusion of almost all else. They are *Pope v. Williams*, 98 Md. 59, 56 A. 543, aff'd. 193 U.S. 621, 48 L.Ed. 817 (1904), and *Southerland v. Norris*, 74 Md. 326, 22 A. 137 (1891).

The *Pope* case involved construction of a Maryland Statute which required a person coming into the state to register his name with the clerk of the county or city and thus indicate his intention of becoming a citizen and resident a given time previous to voting. The Maryland statute was upheld on the ground that the indication of residency by so registering was a qualification for voting, and subject to control by the state.

We wish to emphasize from the *Pope* case two holdings: First, the act of registering is a *qualification*, exactly the opposite meaning than that contended for by Appellants; and second, *all* new residents were required to so register, not only those voting in federal elections. The discrimination of the Virginia Special Acts was absent from the Maryland statute.

The *Southerland* case involved a Maryland statute which required removal from the registration lists of persons removing from Maryland and taking up residence elsewhere, unless such person made and filed an affidavit that he intended to return to Maryland six months prior to the election of November 1890.

This statute was sustained by the Maryland court on the ground that it concerned evidence of residence.

But again note the dissimilarity with the Virginia Statutes involved here. In the Maryland statute there is no discrimination, *all* persons removing must file, not only those voting in Federal elections.

While Appellants argue that the *Southerland* case is authority for their position, it is interesting to note that the *Pope* case is later in time than the *Southerland* case, and the State of Maryland contended in *Pope*, and was supported by this court, that the registration for incoming residents was a *qualification.*

The sum total of both cases is this:

In both cases the Maryland statutes did not discriminate against federal voters—the Virginia Statutes do.

The ruling by this court in the *Pope* case as to what constitutes a qualification is directly against Appellants' position. It is only fair to assume that had the Maryland statutes provided for registration and affidavits only by federal voters, they would have been held invalid as were the Virginia Special Acts by the District Court.

Had the Virginia Legislature wanted to, it could have provided for certificates of residence for all voters, state and federal, and the problem might have been solved. But it obviously did not want to solve the problem, it wished to discriminate against the federal voter, who is now required to file the certificate while the state voter is not.

In any event, as the District Court said, ". . . neither case is authority for saddling a voter in a Federal election, in order to maintain his status, with a step or task beyond that required of a voter in a state election." (R. 48)

Such heavy emphasis is laid by Appellants on the Governor's Address (R. 73 et seq.) and the statement of the Attorney General (R. 83 et seq.) that it does not seem amiss for us to comment on the history of this legislation.

The best brief and readable histories of the Virginia suffrage provisions prior to 1902 we have found are *Long's*

Constitution of Virginia, and the opinion in *Willis v. Kalmback*, 109 Va. 475, 64 S.E. 342.

Not a jot or a tittle is found to support Appellants' contention that the poll tax is evidence of residence and a means of keeping an up to date voting list, and has been considered such since 1902.

The *Debates of the Virginia Constitutional Convention of 1902* is a full and accurate reporting of the entire convention. The principal objective of the Convention was suffrage change, and the subject was debated at great length by the most able people in the Commonwealth. Not once was payment of poll tax mentioned as anything other than a qualification for voting. To the contrary it was often discussed, and always as an additional qualification to that of residence.

The constitutional provision and the legislation which followed stood unchanged for more than 60 years in any particular which is material here.

Article II, Section 18:

"§18. Qualification of voters.—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, ha[illegible]een registered, *and* has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved until the expiration of thirty days after such removal.

"The right of citizens to vote shall not be denied or abridged on account of sex."

Va. Code §24-17. "Persons entitled to vote at general elections.—Every citizen of the United States twenty-one years of age, who has been a resident of the State

one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the election, in which he offers to vote, has been duly registered, *and* has paid his State poll taxes, as required by law, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. Removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal."

Note in both the constitution and the statute the use of the conjunctive *and:* ". . . who has been a resident of the State one year . . . *and* has paid his state poll taxes . . .".

Not a word is found in the Code, or in the *Debates*, or anywhere else, about payment of poll tax being anything other than a qualification for voting until November 12, 1963, when the Attorney General made his statement to the Privileges and Elections Committees of the General Assembly, which was quickly followed by the Governor's address on November 19, 1963.

Having thus slept silently and unnoticed (indeed without record), this "proof of residence" came into the world, and in two speeches legislative history was born.

No attempt was made in the Convention to hide the purpose of the poll tax. It had nothing to do with residence or attachment to community. It was put in purely and simply for the purpose of restricting the electorate, and the annals of the Commonwealth do not reveal any mention of proof of residence until November 1963.

The legislature cannot by fiat simply say that the certificates of residence are not qualifications. If in fact they are qualifications, all the legislation in the world cannot change it. A silk purse cannot be made from a sows' ear. Neither can the legislature make a qualification into mere evidence of residence.

The entire history of the poll tax in Virginia, and the statutes here under review, we submit, compel the conclusion that the sole object of the Special Acts was to hinder the voter who would not pay his poll tax as much as possible by the establishment of additional qualifications.

We invite the attention of the court to the Special Acts, defendants Exhibit No. 31 (R. 91 et seq.).

(1) At p. R. 92 in the preamble is the following language:

> ". . . to file certificates of continuing residence so as to be able to vote, *if otherwise qualified, in Federal elections. . .*"

"If otherwise qualified" must refer to something. It is obvious that at the very outset of the bill the legislature recognized that filing the certificate was a qualification. The same phrase "otherwise qualified" is used in referring to the poll tax and other qualifications in Sec. 24-17 of the *Virginia Code.*

(2) At the top of p. R. 94 is a statement that:

> "The right . . . to vote [in Federal elections] . . . shall not be denied or abridged by reason of failure to pay poll tax or any other tax."

Yet the State unequivocally instructed that a person registered prior to December 1963, who wished to vote in the 1964 general election is required to file the certificate of residence or pay the poll tax, or he cannot vote. See plaintiffs exhibit 5 (R. 60), and defendants exhibit 38 (R. 112). If a voter does not pay his poll tax, or file the invalid certificate, he may not vote. If this is not an abridgement or denial of his rights we fail to see what it is.

(3) At p. R. 94, in speaking of the revised Sec. 24-17 of the code the comment states:

> "This section presently states the *qualifications* required of all persons offering to vote in all elections held in this state. . . ."

Thus poll taxes are referred to as *qualifications.*

(4) At p. R. 95 is the new Sec. 24-17.1 with its comment that:

"§24-17.1 allows *any* registered voter to vote in Federal elections, even if he has not paid poll taxes. . . ." (italics not ours)

(5) This comment, however, is quickly followed by new Sec. 24-17.2, which takes away from the voter the right just given him if he fails to file the certificate of continuing residence, or at his option paying a poll tax. Since the payment of the poll tax is universally admitted by everyone other than Appellants to be a qualification, how can they maintain that the optional method of filing the certificate is not a qualification?

(6) At p. R. 95, 96, and 97 the comments on Sec. 24-17.1 and 24-17.2 quickly switch from referring to poll taxes or the certificates as qualifications, and speak of either merely as proof of residence.

(7) At p. R. 98, Sec. 24-67 of the Code amends the previously existing 24-67 to provide for a special roll for registering for all elections, and the comment refers to the poll tax as a qualification for registration for voting.

(8) At p. R. 99, Sec. 24-67.1 sets up the different rolls of persons registered and qualified to vote in Federal elections only.

(9) At p. R. 100, Sec. 24-78, Sec. 24-79, and Sec. 24-87.1 provide for the posting, certification, recording, and transfer of both registration rolls.

(10) At p. R. 101, Sec. 24-120 requires the treasurer to file, 158 days before the election, lists of those who have paid poll taxes and those that have filed certificates of residence. Thus the list of certificates, claimed not to be a qualification, is accorded the same treatment as the poll tax list, which is a qualification.

(11) At p. R. 102, Sec. 24-121 requires the poll tax list and the certificates list to be posted in the same manner, and requires them to be delivered in the same manner to the registrars.

(12) At p. R. 102, Sec. 24-122 requires both lists to be similarly retained by the clerk for public inspection.

(13) At p. R. 102 and 103, Sec. 23-123 provides the same procedure for the correction of both lists by persons whose names have been improperly omitted.

(14) At p. R. 103, Sec. 24-124 requires the clerk to deliver both lists in the same manner to the judges of elections. The section further provides that each list shall have the same effect.

(15) At p. R. 103, Sec. 24-128.1 provides the same method for transferring people on the certificate list, as is provided by Sec. 24-128 for people on the poll tax list.

The only conclusion we are able to draw from the above comparison is that the Special Acts are designed as an effective substitute for the poll tax to restrict the electorate in federal elections, and are a patent evasion of the 24th Amendment, as well as an invidious discrimination against the federal voter.

At the risk of repetition we would like to tabulate the differences in the law for those voting for the House of Delegates and those voting in a federal election.

House of Delegates and Federal Elections.	*Federal Elections Only*
1. Must be registered on books for all elections.	1. May be registered on books for all elections, or for federal elections only.
2. Must have paid three years poll tax six months before election.	2. Must have paid three years poll tax six months before election, or file a certificate of residence six months before election.
3. Poll tax payment may be made during any month of the year.	3. Certificate of residence must be filed after Oct. 1st of year prior to election.

4. Poll tax payment requires no statement of residence, no witness or oath, no signature, no statement of intention not to remove from the city or county.	4. Certificate of continuing residence requires a written statement of residence, a witness or an oath, a signature and a statement that the voter intends not to remove from the city or county.
5. There is a receipt for poll tax payment.	5. There is no receipt for filing a certificate of continuing residence.

The above listed differences make it clear that the State is not doing what she ought to have done, that is to say, provided different qualifications for voters for state and federal elections. It has provided different qualifications for voters in the same election, if the election be for federal office. This is just exactly what the Constitution of the United States forbids.

We submit the Massachusetts analogy cited by Appellants to be without merit. The fallacy in their reasoning is this: Massachusetts does not require payment of a poll tax as a prerequisite for either registration or voting, and has annual registration. Now if Virginia had annual registration, and if a person could register and vote here without the payment of poll tax, the analogy might have merit; but, since neither condition prevails the analogy accordingly must fail.

II.

THAT THE DISTRICT COURT DID NOT ERR IN HOLDING INVALID THE SPECIAL ACTS COMPLAINED OF AS APPLIED TO PRESIDENTIAL ELECTORS.

As earlier stated, we do not agree with the question presented to this court involving presidential electors.

We should make our position unmistakeably clear:

We contend, and have from the outset, that the Special Acts are in violation of Amendment XIV to the U. S. Con-

stitution, and §§42 U.S.C. 1983 and 1988, in that they deprive citizens within the jurisdiction of Virginia the equal protection of the laws, and abridge their rights, privileges and immunities.

The order of the District Court (R. 51-52) does not, as is implied from Appellants' brief, hold the statutes invalid simply because in violation of Article 1, Section 2, or Amendment XVII to the U.S. Constitution, rather the court states the order is based on "the reasons stated in its opinion this day filed", and that the Special Acts are "invalid because in violation of the Constitution of the United States." (R. 51)

The opinion (R. 42-50) takes great pains to point out the discriminatory effects of the Special Acts, and accordingly a holding that they are in violation of Amendment XIV and §§42 U.S.C. 1983 and 1988 is inevitable.

Quoting from the opinion:

". . . Virginia has enacted an *additional* qualification for the Federal voter." (R. 43)

"Thus the Virginia statutes . . . imposing the *extra* test upon the Federal elector. . . ." (R. 43)

"Because of the 1963 Acts, with the poll tax removed from Federal elections, the electors in the two elections do not enjoy equal eligibility." (R. 47)

"The Federal elector must file a witnessed or notarized certificate of residence, not only declaring himself a current resident of Virginia, but also that he has been a resident since his registration. After giving his street number and his residence, he must give assurance of his intention not to remove from the city or county prior to the next general elections.

"On the other hand remittance of the poll tax by the State elector need not be accompanied by any express representation whatsoever of present residence. No affirmative proof has to be adduced that it has continued uninterrupted since his original registration. Thus the State elector's residency is accepted as unbroken from the date of his registration. No such presumption

is accorded the Federal voter." (R. 47)

"The argument is that the poll tax payment requires all that the certificate requires. This view cannot stand against the obvious fact that the payment of the poll tax does not entail a procedure which is trustworthy in vouching residence." (R. 47)

"That the tax payment will be accepted in satisfaction of residential requirements even in a Federal Election, despite its almost total deficiency as evidence of residence, reveals the certificate as an independent or super added qualification." (R. 47)

"We think the 1963 Acts do add a distinct qualification. The excess of exactions in themselves constitute a special qualification." (R. 48)

". . . they [the 1963 Acts] unreasonably burden the duty of the Federal elector beyond that of a voter for the House of Delegates." (R. 48)

In addition to the above listed quotes from the opinion of the District Court we refer the court to the tabulated differences and inequalities set forth earlier in this brief.

Was the language of the District Court inartful in that it may not have spelled out that the Special Acts are a violation of Amendment XIV and its accompanying statutes?

We think not. The District Court did everything except draw a picture to set forth the inequalities of the Special Acts.

We submit the question posed this court (No. 2) is rather a strained construction of the opinion of the court below.

III.

THAT THE DISTRICT COURT ACTED PROPERLY IN NOT APPLYING THE DOCTRINE OF ABSTENTION.

(A). There is no pending litigation instituted at the instance of the State to seek a construction in state courts

of the statutes complained of. It is a matter of public record that many Virginia statutes have their validity tested by the Attorney General by way of mandamus under *Virginia Code,* Sec. 8-714 and similar statutes. (See annotations in Virginia Code and cases annotated.) Yet no such action was commenced by the State in this case. To the contrary, the State Board of Elections has proceeded to execute the Special Acts. Although these cases have been filed since February 20, 1964, no action has yet been commenced by state officials in the state courts to have the matter decided.

(B). It has been suggested that Appellees proceed under the Virginia Declaratory Judgment statutes, *Va. Code,* Sections 8-578, et seq.

This only suggests more delay. Not counting the time in the trial court, an appellant can legitimately take about six months during the pendency of an appeal. See *Va. Code,* Section 8-463, and *Rules of the Supreme Court of Appeals of Virginia,* Part 5. Time between a final order in a trial court, and an adjudication by our state Supreme Court, is about a year.

(C). The present case before this court involves the constitutional civil rights of voters of this state. The controversy is not limited to the type which requires that a definitive interpretation or construction of state statutes which are not clear on their face, be made by the courts of this state before it is ascertainable a constitutional controversy exists.

In this case Appellees have no way to test the validity of the legislative action by violating the same and in doing so requiring the state through its courts to enforce obedience to its statutes.

In *Harrison v. N.A.A.C.P.,* 360 U.S. 167, 79 S.Ct. 1025, 1030, 3 L.Ed. (2d) 1152, (1959) the Supreme Court reasons as follows:

> "The present case in our view, is one which calls for the application of this principle, [abstention] since we are unable to agree that the terms of these statutes leave no reasonable room for a construction by the Virginia

courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." 79 S.Ct. 1025, 1030.

The wording and effect of the statutes complained of in this suit are clear and unambiguous.

Further in *Harrison v. N.A.A.C.P.* is seen the reasoning of the court in upholding the abstention doctrine as follows:

"Because of its findings amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irreparable injury on appellees the District Courts' abstention with respect to Chapters 33 and 36 proceeded on the assumption 'that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached . . .' 159 F. Supp, at page 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrace also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation." 79 S.Ct. 1025, 1031.

This avenue of temporary relief pending any possible other litigation embracing a doctrine of comity is not available for Appellees herein. The damage suffered here cannot be held in abeyance during the pendency of other judicial pursuits.

The following offer was made to Appellants in the District Court in our reply brief at p. 12. The offer did not get a reply, and is *not* now renewed.

"At this point we should state that if the defendants will agree that all persons registered on either the registration books for all elections or for federal elections only, be allowed to vote in the 1964 elections without the payment of a poll tax or filing a certificate of continu-

ing residence, then we would not object to a stay, providing the federal courts retain jurisdiction and the right to finally adjudicate the matters at issue in these suits."

The deprivation of Appellees' rights is complete in its present state. This is the deprivation of a class as well as an individual right, a deprivation that will not be peculiar to the circumstances of individuals. This case is not subject to the reasoning followed in *Martin v. Creasey*, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed. (2d) 1186, (1959) which set-forth the following:

". . . among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the *premature* determination of constitutional questions. All those factors are present here.

"At least one additional reason for abstention in the present case is to be found in the complex and varying effects which contemplated state action may have upon the different landowners.

". . . In the state court proceedings, the case of each landowner will be considered separately, with whatever *particular problems* each case may present." 79 S.Ct. 1034, 1037.

Appellees submit that their seeking of a determination of constitutional questions is neither particular nor premature. Their rights are *now* affected.

Appellants' motion to stay under the theory of abstention relied in part upon the case *Lassiter v. Taylor*, 152 F. Supp. 295, wherein a stay was granted.

"We think also, that administrative remedies provided by the act should be exhausted before action by the federal courts is invoked."

No effective administrative remedies are provided the Appellees herein.

We contend that the cases cited in support of Appellants' position, when considered in their various settings, and remaining cognizant of the facts of the immediate controversy, tend squarely to support Appellees' standing before this court.

The doctrine of abstention relied on by defendants is further developed in the recent decision of *McNeese v. Board of Education for Com. Unit Sch. Dist.*, 373 U.S. 668, 83 S.Ct. 1433 (1963). Here the court recognizing the doctrine of abstention says:

> "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed. (2d) 492.
>
> "It is no answer that the State has a law which if enforced would give relief The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.
>
> "The cause of action alleged here is pleaded in terms of R. S. Sec. 1979, 42 U.S.C. Sec. 1983, which reads
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

After quoting this section the court briefly explains the same by continuing:

> "The purposes were severalfold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' (*Monroe v. Pape*, supra; at 174, 81 S.Ct. 477), and to provide a remedy in the federal courts sup-

plementary to any remedy any state might have, Id., 180-183, 81 S.Ct. 480-482.

"We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 83 S.Ct. 1433, 1435, 1436.

Abstention as set forth in *Railroad Commission v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), is further revised in the recent decision in *England v. Louisiana State Board of Medical Examiners*, 84 S.Ct. 461 (1964). In the concurring opinion in the *England Case*, by Mr. Justice Douglas, is said:

"The Pullman Case, decided a little over 20 years ago launched an experiment in the management of federal-state relations that has inappropriately been called the 'abstention doctrine' . . . .

"I was a member of the Court that launched *Pullman* and sent it on its way. But if I had realized the creature it was to become, my doubts would have been far deeper than they were." 84 S.Ct. 461, 469, 470.

The court in the *England Case* sets forth the following rationale:

"There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, had conferred specific heads of jurisdiction upon the federal courts, and with the principle that 'When a federal court is properly appealed to in a case over which it has by law jurisdiction . . . the right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied.' *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S. Ct. 192, 195, 53 L.Ed. 382. Nor does anything in the abstention doctrine require or support such a re-

sult. Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29, 79 S.Ct. 1070, 1073, 3 L.Ed. (2d) 1058. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.' *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed. (2d) 1152; accord, *Louisiana P. & L. Co. v. Thibodaux*, supra, 360 U.S. at 29, 79 S.Ct. at 1073, 3 L.Ed. (2d) 1058. . . .

"Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination. The possibility of appellate review by this court of a state court determination may not be substituted against a party's wishes, for his right to litigate his federal claims fully in the federal courts." 84 S.Ct. 461, 464, 465, 466.

Appellees are deprived of equal protection of the laws which certainly constitutes a deprivation of rights or privileges secured by the Constitution. They are unwilling victims of a double standard, and by their complaint seek redress in the federal forum.

IV.

THAT THE DISTRICT COURT DID NOT ERR IN OVERRULING APPELLANTS' MOTIONS TO DISMISS.

A. *Indispensable Parties.*

In Virginia the local electoral boards and registrars are under the complete control of the State Board of Elections.

This is made amply clear by Appellees' exhibits (R. 55-69) in evidence in this proceeding where instructions, not advice, were given to local officials by the State Board of Elections.

The duties of the State Board of Elections are set out in Section 24-25 of the *Virginia Code* as follows:

> "The State Board of Elections shall so supervise and co-ordinate the work of the county and city electoral boards and of the registrars as to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make such rules and regulations not inconsistent with law as will be conducive to the proper functioning of such electoral boards and registrars, and may institute proceedings for the removal of any member of an electoral board or other election official and any registrar who fails to discharge the duties of his office."

In addition, the Board may require the purging of registrar's books in a county, city, or precinct, and if it is of the opinion that the public interest will be served, may request the Attorney General or other legal assistance to enforce the laws. The State Board of Elections prepares registrar's books, forms for voter registration, etc. (See *Virginia Code*, Sections 24-26 and 24-27).

The duties of the clerk of the court are purely ministerial in receiving, filing, and delivering the lists of treasurers and registrars. The clerk has nothing to do with the preparation of the lists, and his discretion in performing any act under the election laws is not involved.

The local electoral boards appoint the registrar, but all the registrar does is to admit the voters for registration and to keep a record of them.

In these cases the State Board of Elections can issue any rule or regulation in accordance with law for the supervision of the local electoral boards and registrars. Should the decision of the District Court be upheld all the State Board of Elections has to do is to direct the local electoral boards and registrars to take such action as has been declared

consistent with law in these cases. Despite protestation that it could not, the November, 1964 election was conducted with no uproar.

Appellants' entire argument concerning indispensable parties is based on the fact that the State Board of Elections is only a nominally superior governmental agency. We submit that such is not the case. By statute, the State Board of Elections, is given the power to *supervise* the work of local electoral boards and registrars. *Webster's New International Dictionary, Second Edition*, gives the following definitions of supervise: "To look over so as to read or revise; to peruse; scan; correct (obsolete)"; and then "to oversee for direction; to superintend; to inspect with authority." No reason has been given why the ordinary meaning of supervise ought not to be applied in this case.

B. *Henderson.* (Speaking in the present tense on the day the case was heard, May 12, 1964)

Henderson is a citizen, resident and registered voter of Fairfax County, Virginia. He is at present entitled to vote in all elections, and is Chairman of the Republican Party in Virginia. As such he has a real and vital interest in all elections conducted in this Commonwealth.

Henderson is but an individual in the mass of the qualified electorate, but as an individual in this mass he is immediately harmed or threatened with immediate harm when those of his class, as an electorate, must qualify to vote under the contested Virginia legislation. He has a presently existing case or controversy when the force of his present voting power is affected by existing legislation.

It is apparent that Henderson's ballot, which is his right as a presently qualified voter, is affected immediately by the present dual standard of qualification. This is not the same situation as *Poe v. Ullman*, 367 U.S. 497 81 S.Ct. 1752, 6 L.Ed. (2d) 989 (1961), the famous Connecticut contraceptive case, where an unasserted statute had lingered in effect, unapplied for some eighty years, only to be prematurely attacked. It is apparent that Henderson's rights are now affected by the legislation he calls into question. He is now

faced with an actual interference with his right. There is a justiciable controversy here in view of the patent invasion of his right by the Special Acts complained of. It is to just such a controversy that the federal judicial power extends.

As an individual Henderson has but one vote to cast in any election in which he may be qualified to vote. His vote, when counted, numbers but one of a class of similar votes, each only so strong as any other in relation to the total receivable. Any infringement on a potential vote directly affects the power of his and as such affects his enfranchisement.

Appellants would argue that ". . . he could not have been denied his franchise . . ." In the assessment of ones franchise is necessarily entwined the constitutional right to have the vote accurately reflect the intention of the qualified electorate. If a double standard of qualification, as is presently in existance in Virginia, is applied to the potential electorate, the resulting number of qualified votes is necessarily affected. Any such double standard is repugnant to the Federal Constitution and presents a present controversy which affected Henderson yesterday, affects Henderson today and will affect Henderson so long as the same is allowed to continue.

In the election for President, Vice President, U. S. Senator, and member of the U. S. House of Representatives from the Tenth District Henderson has an immediate real interest in the result of the election.

We maintain that Henderson has a real and present interest in the outcome of this fall's elections. He has a right to have the electors for President, Vice President, U. S. Senator, and the Member of the House from the Tenth District elected under constitutional statutes by an electorate which is constitutionally qualified.

V

CONCLUSION

Every difficulty, every problem, and every question in this case is not new. They are older that the United States

itself. The difficulty is that the problems are not now faced squarely, and with the fairness and candor exhibited by the gentlemen who were the architects of our federal system at the beginning of the Republic, and the architects of the Virginia system of suffrage established in 1902.

From the *Federalist* No. LXI (Hamilton), February 26, 1788, concerning the provisions of the United States Constitution on elections:

> "And in relation to the point immediately under consideration, they ought to convince us that it is less probable that a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors, than that a similar spirit should take possession of the representatives of thirteen States, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests."

From the *Federalist* No. LX (Hamilton) February 26, 1788:

> "We have seen that an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures."

And again in the same paper:

> "The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature."

From the *Federalist* LVII (Hamilton or Madison), February 19, 1788:

> "Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are

to be the *same* who exercise the right in every State of electing the corresponding branch of the legislature of the State."

The Legislature, we contend, has wholly failed to consider the U. S. Constitutional provisions and their background, and has practiced outright discrimination against the voter in federal elections. The Acts are an obvious attempt by the Legislature, to provide an equally or more offensive hinderance to the exercise of suffrage than the one removed by the 24th Amendment. But to be valid, the same conditions must be applied to the State as to the Federal voter. This has not been done.

Accordingly, we submit the order of the District Court ought to be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, H. E. Widener, Jr., one of the attorneys for the Appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of January, 1965, I served copies of the foregoing brief on the several Appellants hereto by mailing same in duly addressed envelopes, with first-class postage prepaid to their respective attorneys of record as follows:

Hon. R. Y. Button, Supreme Court Building, Richmond, Virginia; Richard N. Harris, Esq., Supreme Court Building, Richmond, Virginia; Joseph C. Carter, Jr., Esq., 1003 Electric Building, Richmond, Virginia; and E. Milton Farley, III, Esq., 1003 Electric Building, Richmond, Virginia.

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